

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

MARCH 21, 22, AND 23, 1974

San Francisco

A meeting of the California Law Revision Commission was held in San Francisco on March 21, 22, and 23, 1974.

Present: Marc Sandstrom, Chairman
John N. McLaurin, Vice Chairman
Thomas E. Stanton, Jr.
Howard R. Williams

Absent: Robert S. Stevens, Member of Senate
Alister McAlister, Member of Assembly
John J. Balluff
Noble K. Gregory
John D. Miller
George H. Murphy, ex officio

Messrs. John H. DeMouly, Jack I. Horton, Nathaniel Sterling, and Stan G. Ulrich, members of the Commission's staff, also were present. Professors Stefan A. Riesenfield and William D. Warren, Commission consultants on creditors' remedies, were present on Friday, March 22, and Saturday, March 23.

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ADMINISTRATIVE MATTERS

Approval of Minutes

The Minutes for the February 14 and 15, 1974, meeting were approved as submitted.

Legislative Program

The Executive Secretary reported on the progress of the 1974 legislative program, summarized below as of March 20, 1974:

1974 LEGISLATIVE PROGRAM

MEASURES PASSED BY FIRST HOUSE

- ACR 164 - Resolution to Continue Authority to Study Topics and to Drop Topics
- AB 101 - Wage Garnishment--Set for hearing in Senate Judiciary Committee on April 2 .
- AB 102 - Discharge From Employment--Set for hearing in Senate Judiciary Committee on April 2

MEASURES APPROVED BY POLICY COMMITTEE IN FIRST HOUSE

- AB 2828 - Erroneous Disclosure of Privileged Information (Sent to Assembly Floor "do pass")
- AB 2829 - Enforcement of Sister State Judgments (Sent to Assembly Floor "do pass")
- AB 2948 - Prejudgment Attachment (Sent to fiscal committee "do pass as amended")
- SB 1533 - Nonresident Aliens (Sent to Senate Floor "do pass")
- SB 1535 - Improvement Acts (Sent to Senate Floor "do pass as amended")

BILLS STILL PENDING FOR HEARING IN POLICY COMMITTEE FIRST HOUSE

AB 2830, AB 2831 - Landlord-Tenant Relations--Set for hearing by Assembly Judiciary Committee on March 26; to be considered at March Commission Meeting

SB 1532 - Liquidated Damages--Set for hearing by Senate Judiciary Committee on April 2; to be considered at March Commission Meeting

SB 1534 - Evidence Code Section 999--The "Criminal Conduct" Exception (not set for hearing; to be considered at March Commission Meeting)

DEAD BILLS

None

Consultant

The Commission indicated an interest in studying the procedure for private power of sale under trust deeds and mortgages, right of redemption in such cases, the rights of the holder of a land sales contract, and related matters as one aspect of the study of enforcement of judgments.

The Commission requested that the staff review the budget to determine whether funds are available for an expert consultant on this topic, to find a possible consultant or consultants on the topic, and to submit its recommendations on the same to the Commission at the next meeting.

STUDY 39.120 - EXECUTION

The Commission considered Memorandum 74-10 and portions of the draft statute attached thereto. The following action was taken:

General approach. It was decided that a comprehensive revision--not a mere cleanup--should be undertaken. The title should deal with enforcement of judgments generally. That is, all types of judgments, all means of enforcement, and all types of exemptions; not merely money judgments, not merely enforcement by execution, and not merely the exemptions now located in the Code of Civil Procedure. In organizing the statute, the staff was directed to consider the separate treatment of money judgments as distinct from judgments for the possession or sale of real or personal property.

Time for enforcement. The statute should provide a basic 10-year period for the enforcement of any judgment. (However, as to an installment judgment, the rule that the period commences on the date that such installment accrues should be retained.) A judgment should be renewable once as a matter of right during the last year of the 10-year period for another 10 years from the date the judgment would have expired. This should be accomplished by a simple filing procedure. Any judgment lien acquired by refiling and rerecording would not be retroactive but would be effective only from the date of rerecording. Thus, a homestead acquired after the initial judgment lien was obtained would prevail over the subsequent lien acquired by rerecording. The statute should preclude any other means of extension, e.g., no action on the judgment should be permitted and there should be no tolling of the period by virtue of the debtor's absence from the state or other reason.

Enforcement after death of judgment debtor. The policies embodied in the draft statute were approved, but the staff was directed to clarify the statute, if necessary, to make clear (1) the manner in which a judgment for the sale or possession of property is enforced and (2) that an attachment (or judgment) lien has continued validity where property has been transferred to a third person by the defendant (or judgment debtor).

Remedies of state agency. Section 701.160 was approved as drafted.

Forms and rules. Section 701.170 was approved as drafted. The Commission did not believe that a section comparable to N.Y.C.P.L.R. Section 5240 which specifically authorizes the judicial exercise of broad discretionary powers to limit or extend any enforcement procedures was desirable.

Levying officer. The term "levying officer" should be used in this title, but the staff was directed to consider generalizing Code of Civil Procedure Section 17(10).

Sale of property after levy of execution. The statute should provide generally for sale of personal property which the levying officer seizes pursuant to a writ of execution or which comes into his possession by delivery from a third person after the latter has been garnished. However, as an exception to this rule, the statute should provide for collection by a bonded judgment creditor on chattel paper and negotiable instruments. Sale of such assets should be permitted only upon court order subject to such limitations on the sale as may be appropriate. Similarly, accounts receivable and other rights to payment should as a rule be collected. The terms used in Section 702.130 should be reconsidered to make sure that procedures exist that permit all rights to payment to be reached by a judgment creditor. The statute

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should make clear that a second creditor may reach any surplus available after the first creditor has satisfied his judgment, but the first creditor's rights should continue until he is completely satisfied. The statute should also make clear that, as to chattel paper, the entire bundle of rights of the seller or lessor is in such paper and levy must accordingly be made on the paper rather than on the buyer or lessee of the goods.

Duty of garnishee. Section 702.140 should be revised to refer to a declaration under penalty of perjury rather than a memorandum, the declaration should refer to both property held and turned over and any debt owed, and the statute should refer to the specific sections authorizing an examination of a debtor of the judgment debtor.

Collection against debt owed by public entity. Section 702.150 should be made clear that it provides an exclusive procedure which is good against any public entity. The procedure should be made to apply uniformly to all such entities. The staff was directed to determine whether the limitations on liability provided by subdivision (g) conflict with those provided in the Government Code generally.

Collection against debt owed contractor by public entity. Section 702.160 was approved as drafted, but the staff was directed to consider whether a similar section should be made applicable to private construction contracts.

Manner of sale on execution and redemption from sale. The staff was directed to consider innovations in this area including (1) private sales with the permission of the judgment debtor, (2) court confirmation in advance of sale where the judgment creditor and debtor cannot agree on the price to be obtained, (3) credit sales and authorization for a junior lienholder to include in his bid the amount owing on his obligation, (4) the discharge of all or a portion of the judgment where the judgment creditor sells at a price which

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is too low, and (5) substantially shortened periods for redemption. The staff was further directed to contact selected persons and make a preliminary inquiry concerning problems in the existing law and suggestions for change.

Third-party claims. The staff was directed to redraft these procedures so that the judgment creditor would have an option to pay off or not pay off secured interest holders. This procedure would not affect any right that the secured person has pursuant to his agreement to accelerate payment of his obligation. However, in the absence of such acceleration or payment by the judgment creditor, the secured interest holder would not be paid, but the property (collateral) would be sold subject to such security interest.

Property subject to execution. Procedures for reaching licenses should be provided. Section 702.170 should be reexamined to determine whether awards for personal injury can be both exempted generally and excluded from the lien of a general creditor. However, perhaps a lien should be provided for doctors, hospitals, and the attorney for services rendered to the injured person.

Exemptions. The staff was directed to present the chapter relating to exemptions at the next meeting. In the meantime, however, the manner of exempting health and life insurance should be reexamined.

STUDY 47 - ORAL MODIFICATION OF WRITTEN CONTRACTS

The Commission considered Memorandum 74-11 and the attached staff draft of the tentative recommendation relating to oral modification of written contracts.

The staff was instructed to revise and send out for comment the part of the tentative recommendation which would conform Commercial Code Section 2209 to Uniform Commercial Code Section 2-209.

The staff was instructed to give further consideration to Civil Code Section 1698 with the aim of specifying when a written contract may be orally modified. The view was expressed that it might be best to codify the rule in D. L. Godbey & Sons Construction Co. v. Deane, 39 Cal.2d 429, 246 P.2d 946 (1952), and the other exceptions to the rule. The Commission decided not to change Civil Code Section 1697 (providing that oral contracts may be altered in writing without new consideration) or other law concerning when consideration is required for an agreement modifying a contract to be valid.

STUDY 63 - EVIDENCE

Evidence Code Sections 1271 and 1561

The Commission considered Memorandum 74-8. This memorandum noted the possibility of confusion that can result when the procedure provided by Evidence Code Sections 1560-1566 is used to authenticate a copy of a business record mailed to court pursuant to a subpoena authorizing such mailing. The affidavit of the custodian or other qualified witness under Sections 1560-1566 does not satisfy the requirements for the hearsay exception (Section 1271) but apparently some lawyers are not aware of this.

The staff was directed to prepare a draft of a tentative recommendation to deal with this problem and to present it for Commission consideration at a future meeting.

Evidence Code Section 1223

The Commission considered Memorandum 74-13 and the attached letter from Judge Homer H. Bell concerning Evidence Code Section 1223 (hearsay exception for statements made in furtherance of the objective of a conspiracy). After some discussion, the Commission decided not to undertake a study of this section. An important consideration involved in this decision was the belief that the changes suggested by Judge Bell would be extremely controversial and that the possibility of favorable action by the Legislature on those suggestions was remote. Some members of the Commission expressed opposition to the proposed changes; others indicated they had no firm view on the proposed changes but did not believe that it would be profitable to devote any of the Commission's limited resources to this matter in view of the dim prospects for legislative approval of the suggested changes.

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Evidence Code Section 999--The "Criminal Conduct" Exception (Senate Bill 1534)

The Commission considered Memorandum 74-14 relating to Senate Bill 1534 which the Commission recommended to repeal Evidence Code Section 999. After some discussion, it was concluded that further study (after appropriate background material has been provided) should be given to the staff suggested revision of Section 999 as set out in Memorandum 74-14. It was suggested that this matter might be put on the Agenda for the April meeting in Los Angeles for further discussion.

STUDY 72 - LIQUIDATED DAMAGES (SB 1532)

The Commission considered Memorandum 74-15 relating to Senate Bill 1532 (liquidated damages).

The Commission took the following actions with respect to the policy questions raised in the Memorandum and attached draft.

(1) The Commission disapproved any provision for special rules relating to liquidated damages in "a lease for residential purposes." The Commission was unable to understand any reason why the proposal (made by the State Bar Committee on Administration of Justice) applied only to a lease of a dwelling for not more than four families occupied entirely or in part by the lessee. This apparently excludes an apartment in an apartment house. A more substantial problem with the proposed addition was that it provided an amount of liquidated damages deemed valid which apparently applies to a breach by either the lessor or the lessee and to any type of breach, no matter how substantial or insignificant the actual damages. Any such liquidated damages provision should include a clear description of the particular type of breach to which it applies, whether it is failure of the lessor to repair, to provide utility services, to rebuild after a fire, or the failure of the lessee to keep the property in good order, the failure of the lessee to pay his rent on time, and the like. In view of these problems with respect to the proposed additional provision, the Commission decided not to include it in the proposed legislation.

(2) After considering the suggestion of Mr. Bruce Cornblum and the suggestion of the State Bar Committee, the Commission decided to revise subdivision (d) of Section 2954.6 to read in substance as follows:

(d) If the late payment charge referred to in subdivision (c) is not paid within 40 days from the scheduled due date of the delinquent installment payment for which the charge was imposed, the lender ~~may, as his option,~~ shall add the late payment charge to the principal and thereafter charge interest on it at the contract rate unless the lender gives written notice to the borrower prior to the expiration of such 40-day period of his election not to add the amount of such late payment charge to the principal . If Unless the lender elects gives written notice to the borrower within such 40-day period of his election not to add the late payment charge to principal, he cannot thereafter treat the failure to pay the late payment charge as a default.

(3) Subdivision (e) of Section 2954.6 was revised to add the following sentence at the end of the subdivision:

The lender shall accept any installment payments made by the borrower and apply such payments as provided in this section, but this requirement does not prevent the lender from enforcing or continuing to enforce his rights against the borrower or the security.

(4) Subdivision (a) of Section 3320 was revised to add the following sentence:

If the amount specified by the parties in the contract as liquidated damages is greater than five percent of the total purchase price in the contract, the burden is on the party seeking to enforce the liquidated damages provision to establish that the amount was reasonable under the circumstances existing at the time of the making of the contract.

(5) The Commission considered the State Bar Committee suggestion that Section 3319 be revised to expressly except Unruh Act cases. The Commission decided that such a revision was unnecessary and undesirable since the "except as otherwise" clause that introduces subdivision (a) recognizes the Unruh Act and other statutory provisions, many of which are referred to in the Comment to Section 3319.

EXHIBIT STUDY 72

#72

3/21/74

Memorandum 74-15

Subject: Study 72 - Liquidated Damages (Senate Bill 1532)

Attached is a letter from the Chairman of the California Trial Lawyers Association Law Revision Committee commenting on the Commission's liquidated damages recommendation.

Also attached are the recommendations of the State Bar Committee on Administration of Justice. With one exception, the substance of these recommendations is incorporated into the revised copy of Senate Bill 1532 which is attached. The State Bar Committee is favorable to the recommendation; the Northern Section supports the bill even if the suggested revisions are not made.

The only State Bar Committee recommendation we have not incorporated into the draft of the bill is the one proposed for Civil Code Section 3319 (page 5 of Exhibit II--yellow). The additional sentence the Southern Section proposes to add to subdivision (a) of Section 3319 is unnecessary in view of the "except as otherwise provided" clause that introduces subdivision (a).

We plan to go through the revised draft of Senate Bill 1532 at the meeting so that the amendments approved by the Commission can be made early next week.

Respectfully submitted,

John H. DeMouly
Executive Secretary

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February 28, 1974

California Law Revision Commission
School of Law
Stanford, California 94305

Attention: John H. DeMouly, Executive Secretary

Re: Study Pertaining to Liquidated Damages
(December 1973)

Dear Mr. DeMouly:

I agree absolutely in concept with the policy considerations of the study and the recommendation. It is not the purpose of this letter to discuss the law per se. I will only, therefore, make brief comment which may be helpful to the Commission.

Relating to proposed Civil Code §2954.6 my first suggestion would be as follows: In the consumer market relating to the purchase of homes, it is the vogue of the day for workers and professional people to take a vacation lasting two weeks to a month. Many times the consumer will make the monthly payment, go on vacation and not return until they are technically in default on their next payment, to wit, ten to fifteen days. Obviously, the consumer does not want to prepay their next month's rent. I had a situation where I then returned from vacation and received a penalty charge.

It would seem to me equitable that a borrower should be allowed "one late payment per year without having incurred a penalty charge." This would not be prejudicial to the lender because if the person is one who intends, for whatever reason, to continue default, this would be picked up on the second time around.

Secondly, I was wondering if under Civil Code §2954.6[d] the lender does not add the late payment to the principal and thereafter not be able to treat the failure to pay as a "default", whether if the lender does not use this procedure it can then cause a foreclosure for the "penalty amount" where otherwise the borrower has paid all of the principal, interest and impound charges for that month? You could thus have

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February 28, 1974

a default causing the borrower to incur reinstatement charges where the underlying debt is as little as \$10.00 to \$50.00. The borrower would not know, or may want to contest the charge as unreasonable. It would seem to me that a fair procedure would be for the lender to notify the borrower "if it is electing not to add said amount to principal" and will thereby cause a default for the minimal amount. This, of course, is assuming that one can have a default for an amount equal only to the unpaid late payment. I believe it should be spelled out either in the statute or in the comment as to the status of an unpaid default amount, whether that would be a debt giving rise to foreclosure and, if so, an obligation on the lender to notify the borrower that it will not act in accordance with §2954.6[d] to add to principal and interest.

Referring to Civil Code §3319 [Proposed] the statute starts:

"Except as otherwise provided by statute . . ."

It would appear that this statute does not in any way impair the public policy contained in Civil Code §3275 as discussed in Professor Sweet's study, pp.95-100. So that there is no confusion on this point, I believe the comment should make reference to Freedman, Caplan and related cases.

§3319 does not make any attempt to define "liquidated damages." Conceptually, a liquidated damage clause falls between the forfeiture cases construing C.C. §3275 (See study pp.95-100) and the other extreme where damages are not in any way impracticable or extremely difficult to fix. As stated in Professor Sweet's study, pp.133-134:

"Taken together, these emphasize that liquidation will not be permitted when the actual damages or the anticipated damages can be computed by application of a well-established damage measure that can furnish a solution without great difficulty."

Thus, by definition these cases would not involve the parties, or give rise to a situation where the parties have a bona fide reason to

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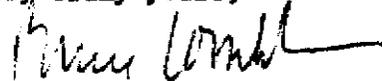
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"liquidate damages" as discussed in the recommendation pp.1208-1209.

It therefore appears to me that Commercial Code Section referred to in your recommendation, page 1207, is completely relevant and, further, "in the body of the statute" renders a relevant criterion. It seems that your proposed §3319 can only have meaning to a drafter after he has "analyzed" the comment and the prior existing law. In fact, Commercial Code §2718 as set forth in Professor Sweet's article, page 109, seems to say everything the Commission is saying in the comment to your proposed §3319.

I believe that Civil Code §3358 (Proposed) should have specific reference to Civil Code §3275 per my discussion above.

Very truly yours,



BRUCE I. CORNBUM, Chairman
California Trial Lawyers
Law Revision Commission

BIC/so

1 Agenda 29.6 - Liquidated Damages

2 South Approved Amendments to LRC Proposal

3 NOTE: LRC proposed language single underlining.
4 CAJ Southern Section proposed language
5 double underlining.

6 Civil Code 1951.5 (Amended)

7 SEC. 4. Section 1951.5 of the Civil Code is amended to read:

8 1951.5. ~~Sections 1670 and 1671~~ Section 3319, relating to
9 liquidated damages, apply applies to a all leases of real
10 property, subject to the following:

11 (a) In a lease for residential purposes the amount specified
12 by the parties as liquidated damages shall be deemed reason-
13 able and shall meet the requirements of Section 3319, if the
14 amount does not exceed the lesser of one-twelfth of the total
15 rental provided in the lease, or twice the monthly rental
16 rate as of the date of the breach.

17 (b) If the amount specified by the parties as liquidated
18 damages in a lease for residential purposes is greater than
19 as provided in Subsection (a), the party seeking to enforce
20 the liquidated damages provision must establish that the
21 amount was reasonable under the circumstances existing at the
22 time of the making of the lease.

23 (c) As used in Subsections (a) and (b), a lease for residen-
24 tial purposes is defined as a lease of a dwelling for not

1 more than four families occupied entirely or in part by the
2 lessee.

3
4 Civil Code 2954.6 (New)

5 SEC. 5. Section 2954.6 is added to the Civil Code, to read:

6 2954.6. (a) As used in this section:

7 (1) "Late payment charge" means a charge, whether or not
8 characterized in the loan contract as interest, that is im-
9 posed for late payment of an installment payment due on a
10 loan secured by a mortgage or deed of trust on real property.

11 (2) "Installment payment" means that portion of a periodic
12 payment that comprises any one or more of the following:
13 principal, interest, and funds to be allocated to impound
14 accounts for property taxes, special assessments, and insur-
15 ance.

16 (b) Except as provided in subdivision (c), a provision in
17 the loan contract imposing a late payment charge is valid if
18 it satisfies the requirements of Sections 2954.5 and 3319
19 and-all-other-applicable-provisions-of-law.

20 (c) Where each of a majority of the installment payments is
21 less than five hundred dollars (\$500), a provision in the
22 loan contract imposing a late payment charge is valid if it
23 satisfies the requirements of Section 2954.5 and both of the
24 following conditions:

1 (1) No late payment charge may be collected on an install-
2 ment payment which is tendered or paid in full within 10
3 days after its scheduled due date even though an earlier
4 maturing installment payment, or a late payment charge on
5 an earlier installment payment, may not have been paid in
6 full. For the purposes of this subdivision, an installment
7 payment shall be considered paid as of the date it is re-
8 ceived by the lender and, unless the borrower otherwise di-
9 rects at the time the installment is paid, payments shall be
10 applied first to current installment payments and then to
11 delinquent installment payments.

12 (2) The amount of the late payment charge shall not exceed
13 10 percent of the amount of principal and interest included
14 in the installment payment except that, where the amount of
15 principal and interest included in the installment payment
16 is less than fifty dollars (\$50), a charge not to exceed five
17 dollars (\$5) or 20 percent of the amount of principal and in-
18 terest included in the installment payment, whichever is the
19 lesser amount, may be made.

20 (d) If the late payment charge referred to in subdivision
21 (c) is not paid within 40 days from the scheduled due date
22 of the delinquent installment payment for which the charge
23 was imposed, the lender may, at his option, add the late pay-
24 ment charge to the principal and thereafter charge interest

1 on it at the contract rate. If the lender elects to add the
2 late payment charge to principal, he cannot thereafter treat
3 the failure to pay the late payment charge as a default.

4 The lender, if he exercises said option, shall give written
5 notice thereof to the borrower within 10 days of exercise of
6 the option.

7 (e) This section limits only the obligation of a borrower to
8 pay a late payment charge. Nothing in this section excuses
9 or defers the borrower's performance of any other obligation
10 incurred in the loan transaction, nor does this section im-
11 pair or defer the right of the lender to enforce any other
12 obligation including but not limited to the right to recover
13 costs and expenses incurred in any enforcement proceeding
14 authorized by law. The lender must accept any installment
15 payments made by the borrower and apply such payments as pro-
16 vided herein, but this shall not prevent the lender from ex-
17 ercising his rights to enforce or continue to enforce his
18 rights against the borrower or the security.

19 (f) This section does not apply to loans made by a credit
20 union subject to the provisions of Division 5 (commencing
21 with Section 14000) of the Financial Code, by an industrial
22 loan company subject to the provisions of Division 7 (com-
23 mencing with Section 18000) of the Financial Code, or by a
24 personal property broker subject to the provisions of Division

1 9 (commencing with Section 22000) of the Financial Code.

2
3 Civil Code 3319 (New)

4 SEC. 6. Section 3319 is added to the Civil Code, to read:

5 3319. (a) Except as otherwise provided by statute, a provi-
6 sion in a contract liquidating the damages for breach of a
7 contractual obligation is valid unless the party seeking to
8 invalidate the provision establishes that it was unreasonable
9 under the circumstances existing at the time of the making of
10 the contract. This section shall not apply to the sale of
11 consumer goods bought for use primarily for personal, family,
12 or household purposes.

13 (b) Subdivision (a) does not apply to provisions included in
14 public contracts pursuant to Section 14376 or 53069.85 of the
15 Government Code.

16
17 Civil Code 3320 (New)

18 SEC. 7. Section 3320 is added to the Civil Code, to read:

19 3320. (a) Subject to subdivision (b), a provision in a con-
20 tract for the sale of real property liquidating the damages
21 to the vendor if the purchaser fails to satisfy his obliga-
22 tion to purchase the property is valid only if such provision
23 is separately signed or initialed by each party and is valid
24 under Section 3319.

1 (b) If the parties to a contract for the sale of real prop-
2 erty provide by a provision separately signed or initialed
3 by each party that all or any part of a deposit that actually
4 is made by the purchaser shall constitute liquidated damages
5 to the vendor if the purchaser fails to satisfy his obliga-
6 tion to purchase the property, the amount so specified by
7 the parties as liquidated damages shall be deemed to be rea-
8 sonable and valid under Section 3319 if it does not exceed
9 five percent of the total purchase price in the contract.

10 If the amount is greater than five percent of the total pur-
11 chase price in the contract, then the party seeking to en-
12 force the liquidated damages provision must show that it is
13 reasonable. For the purposes of this section, "deposit"
14 includes but is not limited to a check (including a post-
15 dated check), note, or other evidence of indebtedness.

16 (c) The validity of the provision for liquidated damages is
17 determined under subdivision (a) rather than under subdivi-
18 sion (b), and nothing in subdivision (b) affects the validity
19 of the liquidated damages provision, in each of the following
20 cases:

21 (1) Where the amount specified as liquidated damages exceeds
22 five percent of the total purchase price in the contract.

23 (2) Where no deposit is made by the purchaser.

24 (3) Where the deposit actually made by the purchaser is less

1 than the amount specified as liquidated damages in the con-
2 tract.

3 (d) Nothing in this section affects the validity of any pro-
4 vision in a contract for the sale of real property other than
5 a provision liquidating the damages to the vendor if the pur-
6 chaser fails to satisfy his obligation to purchase the prop-
7 erty.

8 (e) This section does not apply to real property sales con-
9 tracts as defined in Section 2985.

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AMENDED IN SENATE MARCH 12, 1974

SENATE BILL

No. 1532

Introduced by Senator Stevens

January 10, 1974

An act to repeal Section 10242.5 of the Business and Professions Code, and to amend Sections 1951.5 and 3358 of, to add Sections 2954.6, 3319, and 3320 to, and to repeal Sections 1670 and 1671 of, the Civil Code, AND TO AMEND SECTIONS 14376 AND 53069.85 OF THE GOVERNMENT CODE, relating to liquidation of damages.

1957.6,

LEGISLATIVE COUNSEL'S DIGEST

SB 1532, as amended, Stevens. Liquidated damages.

Repeals existing provisions relative to the enforcement of liquidated damages provisions in contracts generally and provisions regulating late payment charges imposed by real estate loan brokers for installments due on loans secured by a mortgage or deed of trust on real property.

Provides that, with noted exceptions, a contractual liquidated damage provision is valid unless party seeking to invalidate such provision establishes it was unreasonable under circumstances existing at the time of the making of the contract.

Provides for the regulation of both the imposition and the amount of a late payment charge that may be imposed for late payments of installments on loans secured by mortgage or deed of trust on real property. Defines "late payment charge" and "installment payment" for the purpose of such regulation and provides that loans made by specified lenders are not subject to such regulation. Provides that such regulation does not excuse or defer the borrower's performance of any other obligation under the loan transaction, nor impair or defer lender's right to enforce any other obligation under such loan.

Provides that, subject to specified circumstances, provisions

in contracts for the sale of real property liquidating the damages to the vendor if the purchaser fails to satisfy his obligation to purchase the real property are valid if such provisions are separately signed or initialed by each party and are reasonable under the circumstances existing at the time of the making of the contract. Provides that, under specified circumstances, if a purchaser's deposit is designated as constituting liquidated damages to the vendor in a provision of the contract separately signed or initialed by each party, it shall be deemed reasonable and valid if it does not exceed a specified percentage of the total purchase price in the contract.

Makes certain other conforming changes.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 10242.5 of the Business and
- 2 Professions Code is repealed.
- 3 SEC. 2. Section 1670 of the Civil Code is repealed.
- 4 SEC. 3. Section 1671 of the Civil Code is repealed.
- 5 SEC. 4. Section 1951.5 of the Civil Code is amended to
- 6 read:
- 7 1951.5. Section 3319, relating to liquidated damages,
- 8 applies to ~~a lease~~ of real property.

Subject to
Section
1951.6,

all
leases

Sec. 4.5. Section 1951.6 is added to the Civil Code, to read:

1951.6. (a) As used in this section, "a lease for residential purposes" means a lease of a dwelling for not more than four families occupied entirely or in part by the lessee.

(b) In a lease for residential purposes, the amount specified by the parties as liquidated damages shall be deemed reasonable and shall meet the requirements of Section 3319 if the amount does not exceed the lesser of the following amounts:

- (1) One-twelfth of the total rental provided in the lease.
- (2) Twice the monthly rental at the rate in effect as of the date of the breach.

(c) If the amount specified by the parties as liquidated damages in a lease for residential purposes is ^egreater than the amount specified in subdivision (b), the party seeking to enforce the liquidated damages provision must establish that

the amount was reasonable under the circumstances existing at the time of the making of the lease.

9 SEC. 5. Section 2954.6 is added to the Civil Code, to
10 read:

11 2954.6. (a) As used in this section:

12 (1) "Late payment charge" means a charge, whether
13 or not characterized in the loan contract as interest, that
14 is imposed for late payment of an installment payment
15 due on a loan secured by a mortgage or deed of trust on
16 real property.

17 (2) "Installment payment" means that portion of a
18 periodic payment that comprises any one or more of the
19 following: principal, interest, and funds to be allocated to
20 impound accounts for property taxes, special assessments,
21 and insurance.

22 (b) Except as provided in subdivision (c), a provision
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1 in the loan contract imposing a late payment charge is
2 valid if it satisfies the requirements of Sections 2954.5 and
3 3319.

4 (c) Where each of a majority of the installment
5 payments is less than five hundred dollars (\$500), a
6 provision in the loan contract imposing a late payment
7 charge is valid if it satisfies the requirements of Section
8 2954.5 and both of the following conditions:

9 (1) No late payment charge may be collected on an
10 installment payment which is tendered or paid in full
11 within 10 days after its scheduled due date even though
12 an earlier maturing installment payment, or a late
13 payment charge on an earlier installment payment, may
14 not have been paid in full. For the purposes of this
15 subdivision, an installment payment shall be considered
16 paid as of the date it is received by the lender and, unless
17 the borrower otherwise directs at the time the
18 installment is paid, payments shall be applied first to
19 current installment payments and then to delinquent
20 installment payments.

21 (2) The amount of the late payment charge shall not
22 exceed 10 percent of the amount of principal and interest
23 included in the installment payment except that, where
24 the amount of principal and interest included in the
25 installment payment is less than fifty dollars (\$50), a
26 charge not to exceed five dollars (\$5) or 20 percent of the
27 amount of principal and interest included in the
28 installment payment, whichever is the lesser amount,
29 may be made.

30 (d) If the late payment charge referred to in
31 subdivision (c) is not paid within 40 days from the
32 scheduled due date of the delinquent installment
33 payment for which the charge was imposed, the lender
34 may, at his option, add the late payment charge to the
35 principal and thereafter charge interest on it at the
36 contract rate. If the lender elects to add the late payment

is valid under
Section

charge to principal, he shall give written notice of such fact to the borrower within 10 days of the exercise of such election. If the lender elects to add the late payment

37 charge to principal, he cannot thereafter treat the failure
38 to pay the late payment charge as a default.
39 (e) This section limits only the obligation of a
40 borrower to pay a late payment charge. Nothing in this

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1 section excuses or defers the borrower's performance of
2 any other obligation incurred in the loan transaction, nor
3 does this section impair or defer the right of the lender
4 to enforce any other obligation, including, but not
5 limited to, the right to recover costs and expenses
6 incurred in any enforcement proceeding authorized by
7 law.

The lender must accept any installment payments made by the borrower and

apply such payments as provided in this section, but this requirement

does not prevent the lender from exercising his rights to enforce his rights

against the borrower or the security.

8 (f) This section does not apply to loans made by a
9 credit union subject to the provisions of Division 5
10 (commencing with Section 14000) of the Financial Code,
11 by an industrial loan company subject to the provisions of
12 Division 7 (commencing with Section 18000) of the
13 Financial Code, or by a personal property broker subject
14 to the provisions of Division 9 (commencing with Section
15 22000) of the Financial Code.

16 SEC. 6. Section 3319 is added to the Civil Code, to
17 read:

18 3319. (a) Except as otherwise provided by statute, a
19 provision in a contract liquidating the damages for
20 breach of a contractual obligation is valid unless the party
21 seeking to invalidate the provision establishes that it was
22 unreasonable under the circumstances existing at the
23 time of the making of the contract.

24 (b) Subdivision (a) does not apply to provisions
25 included in public contracts pursuant to Section 14376 or
26 52060.85 of the Government Code.

27 SEC. 7. Section 3320 is added to the Civil Code, to
28 read:
29 3320. (a) Subject to subdivision (b), a provision in a
30 contract for the sale of real property liquidating the
31 damages to the vendor if the purchaser fails to satisfy his
32 obligation to purchase the property is valid only if such
33 provision is separately signed or initialed by each party
34 and is valid under Section 3319.

If the amount specified by the parties in the contract as liquidated damages is greater than five percent of the total purchase price in the contract, the party seeking to enforce the liquidated damages provision must establish that the amount was reasonable under the circumstances existing at the time of the making of the contract.

35 (b) If the parties to a contract for the sale of real
36 property provide by a provision separately signed or
37 initialed by each party that all or any part of a deposit that
38 actually is made by the purchaser shall constitute
39 liquidated damages to the vendor if the purchaser fails to
40 satisfy his obligation to purchase the property, the

1 amount so specified by the parties as liquidated damages
2 shall be deemed to be reasonable and valid under Section
3 3319 if it does not exceed five percent of the total
4 purchase price in the contract. For the purposes of this
5 section, "deposit" includes but is not limited to a check;
6 including a postdated check (including a postdated
7 check), note, or other evidence of indebtedness.
8 (c) The validity of the provision for liquidated
9 damages is determined under subdivision (a) rather than
10 under subdivision (b), and nothing in subdivision (b)
11 affects the validity of the liquidated damages provision, in
12 each of the following cases:
13 (1) Where the amount specified as liquidated
14 damages exceeds five percent of the total purchase price
15 in the ~~contracts~~ contract.
16 (2) Where no deposit is made by the purchaser.
17 (3) Where the deposit actually made by the purchaser
18 is less than the amount specified as liquidated damages in
19 the contract.
20 (d) Nothing in this section affects the validity of any
21 provision in a contract for the sale of real property other
22 than a provision liquidating the damages to the vendor if
23 the purchaser fails to satisfy his obligation to purchase the
24 property.
25 (e) This section does not apply to real property sales
26 contracts as defined in Section 2985.

27 SEC. 8. Section 3358 of the Civil Code is amended to
28 read:

29 3358. Nothing in this chapter authorizes a person to
30 recover a greater amount in damages for the breach of an
31 obligation than he could have gained by the full
32 performance thereof on both sides, except in the cases
33 specified in the articles on exemplary damages and penal
34 damages, and in Sections 3319, 3320, 3339, and 3340.

35 SEC. 9. Section 14376 of the Government Code is
36 amended to read:

37 14376. Every contract shall contain a provision in
38 regard to the time when the whole or any specified
39 portion of the work contemplated shall be completed,
40 and shall provide that for each day completion is delayed

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— 6 —

1 beyond the specified time, the contractor shall forfeit and
2 pay to the state a specified sum of money, to be deducted
3 from any payments due or to become due to the
4 contractor. A contract for a road project may also provide
5 for the payment of extra compensation to the contractor,
6 as a bonus for completion prior to the specified time, such
7 provision, if used, to be included in the specifications and
8 to clearly set forth the basis for such payment. *Section*
9 *3319 of the Civil Code does not apply to contract*
10 *provisions under this section.*

11 SEC. 10. Section 53069.85 of the Government Code is
12 amended to read:

13 53069.85. The legislative body of a city, county or
14 district may include or cause to be included in contracts
15 for public projects a provision establishing the time
16 within which the whole or any specified portion of the
17 work contemplated shall be completed. The legislative
18 body may provide that for each day completion is
19 delayed beyond the specified time, the contractor shall
20 forfeit and pay to such agency involved a specified sum
21 of money, to be deducted from any payments due or to
22 become due to the contractor. A contract for such a
23 project may also provide for the payment of extra
24 compensation to the contractor, as a bonus for
25 completion prior to the specified time. Such provisions,
26 if used, shall be included in the specifications upon which
27 bids are received, which specifications shall clearly set
28 forth the provisions. *Section 3319 of the Civil Code does*
29 *not apply to contract provisions under this section.*

Minutes
March 21, 22, and 23, 1974

STUDY 78 - LANDLORD-TENANT RELATIONS
(AB 2830, 2831)

The Commission considered Memorandum 74-12 (handed out at the meeting) which set out various communications concerning Assembly Bills 2830 and 2831 and amendments which are being made to those bills.

It was suggested that the bills be reviewed at the next meeting when they have been reprinted with the amendments included.

EXHIBIT STUDY 78

#78

3/21/74

Memorandum 74-12

Subject: Study 78 - Landlord-Tenant Relations (AB 1532)

Assembly Bills 2830 and 2831 were introduced to effectuate the Commission's recommendations relating to landlord-tenant relations.

Attached are three exhibits containing amendments and revisions that have been suggested by various groups. (Exhibit III sets out amendments suggested by the California Real Estate Association.)

Following the three exhibits are amendments that Assemblyman McAlister has made to the bill; the bill is now being printed to include these amendments. We will go through the suggestions and amendments at the March meeting. The bill is scheduled for hearing on March 26 in the Assembly Judiciary Committee.

Respectfully submitted,

John H. DeMouly
Executive Secretary

memo 74-12

EXHIBIT I

SACRAMENTO OFFICE
STATE CAPITOL
SACRAMENTO, CALIFORNIA 95814
PHONE: (916) 449-7874

DISTRICT OFFICE
1885 EAST SANTA CLARA STREET
SAN JOSE, CALIFORNIA 95116
PHONE: (408) 278-0221

SAL BIANCO
ADMINISTRATIVE ASSISTANT

Assembly California Legislature

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REVISION OF THE
CORPORATIONS CODE
CALIFORNIA LAW REVISION
COMMISSION
COMMISSION ON
SPECIAL EDUCATION

ALISTER MCALISTER
ASSEMBLYMAN, TWENTY-FIFTH DISTRICT

March 18, 1974

Mr. John H. DeMouly
Executive Secretary
California Law Revision Commission
School of Law
Stanford, California 94305

Dear John:

Fred Feiten of the California Apartment Association has indicated to me that they are generally favorable to AB 2830 and AB 2831, but they have some small problems with regard to which they would like for us to consider amendments.

As to both AB 2830 and AB 2831, they would like to restrict the requirement to mail notice to simply the tenant's last known address and his place of employment. They think that any broader requirement will be difficult to administer and productive of confusion.

With regard to AB 2831 only, they believe that either the 20-day notice should be reduced to 10 days; or that the 20-day notice should be reduced to 15 days and the written statement of intent by the leasee be required to be given not less than 10 days (instead of 15 days) after a personal notification, etc.

Also, as to AB 2831, they believe that the leasee should be required to pay rent due when he gives the written statement of intent not to abandon, etc.

Please let me know what you think of these proposals.

Sincerely yours,

Alister McAlister
ALISTER MCALISTER

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IAN PADDOCK
Directing Attorney

ANDREA GEISLER THRONE
Staff Associate

March 15, 1974

Honorable Alister McAlister
Member of the Assembly
State Capitol
Sacramento, California 95814

Re: AB 2830 - Abandoned Personal Property

Dear Mr. McAlister:

I have circulated the original version of your AB 2830 to legal services attorneys concerned with landlord-tenant law throughout the state. They generally support this bill which we understand was prepared by the California Law Revision Commission. We do have a few suggestions which we think would improve the bill.

First, we suggest that a summary statement of the provisions of Civil Code §1988 be added to the "notice of right to reclaim abandoned property" set out on pages 4 and 5 of the bill as amended February 27, 1974. This might be done by allowing the landlord to put in the notice one of two alternative paragraphs at the end of the notice. The first might be something to the effect that: "Because this property is believed to be worth less than \$100, it may be kept, sold, or destroyed without further notice if you fail to reclaim it." Alternatively, the statement would read: "If you fail to reclaim the property, notice of a public sale will be made at least once in a newspaper. You have the right to bid at this sale. After the property is sold and the cost of storage, advertising, and sale deducted, the rest of the money will be given to the county and you may claim remaining money at any time within one year after the county receives the money."

We recognize that this lengthens the notice, but we feel it will avoid unnecessary disputes by making it clear to tenants that the landlord has the legal right to keep or destroy the property of little worth. Similarly, with respect to property of greater value, it advises tenants that any balance after the cost of storage and disposition may be available from the county clerk. Unless such a notice is provided, the mere reference to Civil Code §1988 is not informative to a tenant unless he goes to a lawyer.

Honorable Alister McAlister
March 15, 1974
Page 2

We also suggest that proposed §1988 be amended to include an additional subdivision or sentence making it clear that the tenant has a right to bid at the public sale.

Finally, it is unclear to us why AB 2830 and AB 2831 are joined so that neither is operative unless both achieve passage. While the bills are clearly complimentary, they can also operate independently. Each would simplify and clarify an area of law and each is worthy of passage without being dependent on the other. We urge that the bills not be joined although they should be kept consistent in language so that they will function appropriately if either one is passed or both are passed.

Sincerely,



BRIAN PADDOCK
Directing Attorney

BP/maa

cc: John DeMouilly - California Law Revision Commission

P.S. After this letter was typed I met with John DeMouilly. He is preparing author's amendments to respond to our suggestions. We agreed that AB 2830 and AB 2831 should be joined or severed depending on whether this will assist their passage.

--B.P.

EXHIBIT III

AMENDMENTS TO ASSEMBLY BILL NO. 2831

AMENDMENT NO. 1

On page 2, line 14, of the printed bill, strike out "20"
and insert:

14

AMENDMENT NO. 2

On page 3, line 4, strike out "20" and insert:

14

AMENDMENT NO. 3

On page 3, line 14, after "property" insert:
, and payment of the periodic rent due and unpaid to the date
of your notice

AMENDMENT NO. 4

On page 3, line 27, strike out "20" and insert:

14

AMENDMENT NO. 5

On page 3, line 38, after "property" insert:
, and paid the periodic rent and unpaid to the date of the
leesee's notice

AMENDMENTS TO AB 2830 AS AMENDED IN
ASSEMBLY FEB. 27, 1974

AMENDMENT 1

On page 4, line 14, of the printed bill as amended in Assembly on February 27, 1974, after "1984." insert:

(a)

AMENDMENT 2

On page 5, between lines 1 and 2, insert:

(Here insert statement required by subdivision (b) of this section)

AMENDMENT 3

On page 5, between lines 10 and 11, insert:

(b) The notice set out in subdivision (a) shall also contain one of the statements:

(1) "If you fail to reclaim the property, it will be sold at a public sale after notice of the sale has been given by publication. You have the right to bid on the property at this sale. After the property is sold and the cost of storage, advertising, and sale deducted, the rest of the money will be paid over to the county, and you may claim the remaining money at any time within one year after the county receives the money."

(2) "Because this property is believed to be worth less than \$100, it may be kept, sold, or destroyed without further notice if you fail to reclaim it within the time indicated above."

AMENDMENT 4

On page 6, line 14, after the period, insert:

The landlord shall exercise reasonable care in storing the property, but the landlord is not liable to the tenant or other owner for any loss not caused by the landlord's deliberate or negligent act.

AMENDMENT 5

On page 6, line 29, after the period, insert:

Nothing in this section precludes the landlord or the tenant from bidding on the property at the public sale.

AMENDMENT 6

On page 6, line 31, of the printed bill as amended in Assembly February 27, 1974, strike out "at least once" and insert:
pursuant to Section 6066 of the Government Code

AMENDMENT 7

On page 6, line 33, after "held" insert:

. The last publication shall be

AMENDMENTS TO ASSEMBLY BILL 2831

AMENDMENT 1

In line 1 of the title of the printed bill, after "Code", insert:
and to add Section 415.47 to the Code of Civil Procedure

AMENDMENT 2

On page 2, line 9, after the comma, insert:
stating

AMENDMENT 3

On page 2, line 10, after "property", insert:
and stating an address at which the lessee may be served by certified mail
in any action for unlawful detainer of the real property

AMENDMENT 4

On page 3, line 2, strike out "State", and insert:
state

AMENDMENT 5

On page 3, line 3, strike out "description.)", and insert:
description).

AMENDMENT 6

On page 3, strike out lines 13 and 14, and insert:
written notice from you stating both of the following:

- (1) Your intent not to abandon the real property.
- (2) An address at which you may be served by certified mail in any
action for unlawful detainer of the real property.

AMENDMENT 7

On page 3, line 37, strike out "of", and insert:
stating

AMENDMENT 8

On page 3, line 38, after "property", insert:
and stating an address at which he may be served by certified mail in any
action for unlawful detainer of the real property

AMENDMENT 9

On page 4, following line 2, insert:

Sec. 2. Section 415.47 is added to the Code of Civil Procedure, to
read:

415.47. (a) Where the lessee has given the lessor written notice
of the lessee's intent not to abandon leased real property as provided
in Section 1951.3 of the Civil Code, the summons in an action for unlawful
detainer of the real property may be served on the lessee by certified mail,
postage prepaid, addressed to the lessee at the address stated in the
lessee's notice of intent not to abandon if such summons is deposited in
the mail within 60 days from the date the lessee's notice of intent not to
abandon is received by the lessor. Service in this manner is deemed com-
pleted on the 10th day after such mailing.

(b) This section provides an alternative method of service on the
lessee and does not preclude service in any other manner authorized by
this chapter.